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No. 92-

In the Supreme Court of the United States of America

October Term, 1992

BOBBY WHITWORTH, Individually and in his official capacity as Commissioner of the Department of Corrections of the State of Georgia, CLYDE STOVALL, Individually and in his official capacity as Assistant Commissioner of the Department of Corrections of the State of Georgia, DAVID C. EVANS, Individually, and GEORGIA POWER COMPANY,

Petitioners,

v.

PATAULA ELECTRIC MEMBERSHIP CORPORATION
and
FLINT ELECTRIC MEMBERSHIP CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION OF GEORGIA POWER COMPANY FOR WRIT OF CERTIORARI

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Dated: June 26, 1992

QUESTION PRESENTED

Whether under 42 U.S.C. § 1983 a bidder who has not been awarded a state contract has a constitutionally protected property interest in that contract sufficient to allow it to seek substantive judicial review of the state's decision not to select it to provide such services?

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PETITION OF GEORGIA POWER COMPANY FOR WRIT OF CERTIORARI

Petitioner Georgia Power Company (hereinafter referred to as "Georgia Power")[1], respectfully prays that a writ of certiorari issue to review the judgment and opin-

[1] All parties to the proceedings below are identified in the caption of this petition. *See* Supreme Court Rule 14(b). The parent

ion of the United States Court of Appeals for the Eleventh Circuit in *Pataula Electric Membership Corp. v. Whitworth,* 951 F.2d 1238, *reh'g denied*, 959 F.2d 974 (11th Cir. 1992) (hereinafter referred to as "*Pataula*").

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, issued on January 29, 1992, is published at 951 F.2d 1238, and reprinted in the Appendix hereto at pages 1a-12a. The United States Court of Appeals for the Eleventh Circuit denied Petitioner Georgia Power's Motion for Rehearing by Order dated March 31, 1992, 959 F.2d 974, which is reprinted in the Appendix hereto at pages 13a-14a. The decisions of the United States District Court for the Northern District of Georgia from which Respondents appealed to the Eleventh Circuit issued on November 20, 1990 and January 15, 1991 and have not been reported. They are reprinted in the Appendix hereto at pages 21a-30a and 31a-32a respectively.[2]

JURISDICTION

Respondents invoked federal jurisdiction under 42 U.S.C. § 1983 in their respective Complaints originally filed on July 16, 1990 and July 30, 1990. Each Respondent amended its Complaint on September 7, 1990. On November 20, 1990, the United States District Court for the Northern District of Georgia consolidated the two cases

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company of Petitioner Georgia Power is The Southern Company. *See* Supreme Court Rule 29.1.

[2] Hereinafter all references to the Appendix will be cited as "App. at __ a".

and by written order granted Petitioners' Motions to Dismiss Respondents' Amended Complaints. [App. at 21a-30a]. Reconsideration was denied by the District Court on January 15, 1991. [App. at 31a-32a].

Respondents appealed from the final order of the District Court pursuant to 28 U.S.C. § 1291 to the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit on January 29, 1992 entered a judgment and opinion reversing the District Court's Order dismissing Respondents' Amended Complaints. *Pataula*, 951 F.2d 1238 [App. at 1a-12a]. Rehearing was denied by the Eleventh Circuit on March 31, 1992. *Patula*, 959 F.2d 974 [App. at 13a-14a]. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) which grants power to review all cases in the courts of appeals.

STATUTES AND OTHER PROVISIONS INVOLVED

The statutes and other provisions involved in this case are set forth verbatim in the Appendix as follows:

Civil Action for Deprivation of Rights, 42 U.S.C. § 1983;

Georgia Territorial Electric Service Act, O.C.G.A. §§ 46-3-1, *et seq.* (Michie 1982 & Supp. 1991);

Georgia State Purchasing Act, O.C.G.A. §§ 50-5-50, *et seq.* (Michie 1990 & Supp. 1991) (selected relevant sections);

State of Georgia Vendor Manual (selected relevant sections);

Georgia Department of Administrative Services Purchasing and Surplus Property Division Agency Purchasing Manual (selected relevant sections).

STATEMENT OF THE CASE

This dispute arises from the State of Georgia Department of Corrections' (hereinafter referred to as "D.O.C.") selection of electric suppliers to serve two new state prisons: (1) Pataula Electric Membership Corporation (hereinafter referred to as "Pataula EMC") and Georgia Power submitted proposals to the D.O.C. to provide electric service to a new prison facility located in Calhoun County, Georgia; and (2) Flint Electric Membership Corporation (hereinafter referred to as "Flint EMC") and Georgia Power submitted proposals to the D.O.C. to provide electric service to a new prison in Macon County, Georgia. The prisons are located outside of municipalities and are large enough to qualify as "large load" premises under the Georgia Territorial Electric Service Act (hereinafter referred to as the "Territorial Act"), O.C.G.A. § 46-3-8(a)(5) (Michie 1982 & Supp. 1991) [App. at 48a].[3] The proposals submitted by the electric suppliers were analyzed by a consultant which made recommendations to the D.O.C. [See Exhibit A to Amended Complaint of Flint EMC (App. at 147a); Exhibit A to Amended Complaint of Pataula EMC (App. at 174a)]. Upon consideration, the D.O.C. accepted Georgia Power's electric service proposals to serve each prison. [Amended Complaint of Flint EMC, ¶ 16 (App. at 139a); Amended Complaint of Pataula EMC ¶ 17 (App. at 167a)]. The choice of an electric supplier in Georgia is a life-of-the-premises decision. O.C.G.A. § 46-3-8(b)

[3] Most premises located in the State of Georgia are assigned an electric supplier by virtue of their location. Pursuant to O.C.G.A. § 46-3-8(a)(5) (Michie 1982 & Supp. 1991) [App. at 48a], a new premises with a connection load at initial full operation in excess of 900 kilowatts may choose any electric supplier in the State of Georgia if the premises is located outside a municipality.

(Michie 1982 & Supp. 1991) [App. at 48a]. Thus, once lawfully served by an electric supplier, the new prisons always will be served by the same electric supplier.

Respondents' Amended Complaints allege that State officials, specifically Bobby Whitworth, Clyde Stovall, and David Evans (hereinafter referred to as the "State Defendants"), arbitrarily failed to award electric service contracts to the "lowest responsible bidder." The Amended Complaints allege that the State Defendants were obligated to award electric service contracts to the lowest responsible bidder and that each Respondent was the lowest responsible bidder for each electric service contract. Respondents further allege that, as lowest responsible bidders, they had protected property interests under Georgia law. [Amended Complaint of Flint EMC, Count One (App. at 141a-143a); Amended Complaint of Pataula EMC, Count One (App. at 168a-170a)]. Respondents do not allege that bids were sought pursuant to, or submitted in accordance with the Georgia State Purchasing Act O.C.G.A. §§ 50-5-50, *et seq.* (Michie 1990 & 1991 Supp.) (hereinafter referred to as the "Purchasing Act") or other state procurement regulations.

Respondents have alleged that, by accepting Georgia Power's proposal for electric service, the State Defendants violated Respondents' right to due process and thereby violated 42 U.S.C. § 1983. As remedies, Respondents each requested that the District Court (1) issue a preliminary and permanent injunction enjoining performance of the Georgia Power electric service contracts; (2) rescind the Georgia Power electric service contracts; (3) award Respondents the electric service contracts; (4) award damages and attorneys' fees against the State Defendants. [Amended Complaint of Flint EMC (App. at

145a); Amended Complaint of Pataula EMC (App. at 172a)].

The District Court for the Northern District of Georgia, Judge Horace T. Ward, consolidated the two actions and dismissed Respondents' Amended Complaints, holding that "plaintiffs have failed to meet their burden of showing that they possess property interests or entitlements granted by state law. Plaintiffs cannot sustain an action under 42 U.S.C.A. § 1983." [Order of the Court dated November 20, 1990 (App. at 29a)]. In reaching this decision, the District Court accepted as true all of Respondents' factual allegations and applied the standards of Federal Rule of Civil Procedure 12(b)(6) to evaluate the sufficiency of the allegations of the Amended Complaints. [App. at 24a]. The court evaluated Respondents' claims on the basis that, "a constitutionally protected property interest exists if acknowledged by applicable state law. To state a cause of action, a disappointed bidder must have been entitled to award of the project under the applicable state law." [App. at 25a]. The court dismissed the Amended Complaints because Respondents could not show that they were entitled to the electric service contracts, and thus had no property interest protected under 42 U.S.C. § 1983. [App. at 29a]. Further, the District Court reviewed the applicable statutes and regulations and ruled that the D.O.C. "was not mandated by law to seek competitive bids for electric service." *Id.* On January 15, 1991, the court denied reconsideration of its previous decision stating that, "Plaintiffs have failed to show a legitimate claim of entitlement under the State Purchasing Act and procurement regulations." [App. at 32a].

By opinion dated January 29, 1992, the United States Court of Appeals for the Eleventh Circuit reversed the

District Court and found that "plaintiffs state a cognizable claim by alleging that defendants abused their discretion by arbitrarily ignoring competitive bidding requirements." *Pataula,* 951 F.2d at 1243 [App. at 11a]. The Eleventh Circuit further found that the State Defendants' "discretion to choose the lowest responsible bidder . . . does not preclude plaintiffs' claim to a constitutionally protected property interest in the award of utility contracts." *Id.* at 1244.

REASONS FOR GRANTING THE WRIT

Respondents allege they would have been selected to provide electric service for the two new prisons but for the arbitrary and capricious actions of state officials. They seek substantive judicial review in federal court through 42 U.S.C. § 1983, on the basis that they had a protected property interest in the contracts they desired. However, in light of this Court's precedents, Respondents did not, and could not, have a property interest in the desired state contracts, because they were mere applicants for government benefits and did not already possess such benefits.

In *Goldberg v. Kelly,* 397 U.S. 254 (1970), the Court inaugurated the modern procedural due process revolution that guarantees some kind of process for those relying upon established government benefits. In that case, the Court found that a welfare recipient's interest in continued receipt of welfare was a "statutory entitlement" that amounted to "property" within the meaning of the due process clause. *Goldberg,* 397 U.S. at 262 n.8, 263. Soon thereafter, the standard for finding a legally protected property interest was developed in *Board of Regents v. Roth,* 408 U.S. 564 (1972), wherein the Court held

that a person possesses a protected property interest in a government benefit if the government mandates that the person is *entitled* to the benefit. *Id.* at 577. In *Roth* the Court applied traditional notions of property to protect the reliance by members of society on benefits provided by the government — benefits, which if arbitrarily withdrawn, would result in severe hardship. "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Id.*

By relying upon established attributes of property, the Court in *Roth* necessarily was providing a boundary for the range of interests that the Fourteenth Amendment protects. While modern legal theory recognizes property interests beyond items such as chattels or land, *see, e.g.*, *Morrissey v. Brewer*, 408 U.S. 471 (1972) (change in status of parolee); *Bell v. Burson*, 402 U.S. 535 (1971) (suspension of driver licenses), the interests or benefits which can be considered property still have to take on the traditional characteristics of property, such as possession. The Court made this clear in *Roth* by its focus on the reliance interest people have in property: "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has *already acquired* in *specific* benefits." 408 U.S. at 576 (emphasis added).

Unlike the case in *Roth*, Respondents have never relied upon acquired benefits because they were never chosen as the exclusive life-of-the-premises electric suppliers for the two new state prisons. Nonetheless, Respondents argue that they should have been awarded the contracts because they were the "lowest responsible bidder" and therefore they have an entitlement to be the

exclusive electric supplier sufficient to invoke judicial review pursuant to 42 U.S.C. § 1983.[4]

In the twenty years since *Roth*, this Court has applied its principles in many contexts, but it has "never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause of the Fourth or Fourteenth Amendment." *Lyng v. Payne*, 476 U.S. 926, 942 (1986). The situation involved here, a Section 1983 challenge by an unsuccessful applicant or bidder for a state contract, is one which has not previously been addressed by this Court and is one as to which there is a great deal of confusion in the lower federal courts. *Compare Peterson Enterprises, Inc. v. Ohio Dept. of Mental Retardation and Developmental Disabilities, No. 89-3347 (6th Cir. November 29, 1989) (LEXIS, Genfed library, App. file); Curtis Ambulance of Florida, Inc. v. Board of County Commissioners*, 811 F.2d 1371 (10th Cir. 1987);

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[4] In their Amended Complaints, Respondents allege that as "lowest responsible bidders" they are entitled to the relief they seek as a result of the provisions of the Purchasing Act, O.C.G.A. §§ 50-5-50, *et seq.* (Michie 1990 & Supp. 1991) [App. at 61a-79a] and Georgia's purchasing regulations and procedures, including the Georgia Vendor Manual promulgated by the Georgia Department of Administrative Services (hereinafter referred to as "DOAS") [App. at 80a-111a] and the DOAS Agency Purchasing Manual. [App. at 112a-128a]. Petitioner Georgia Power contends that, as a matter of law, the selection of a supplier to provide electric service to a facility for the life of the premises is not a procurement but an administrative choice governed solely by the Territorial Act. However, even should the choice of an electric supplier by considered to be a procurement subject to the Purchasing Act, the provisions and policies of the Territorial Act must nevertheless be considered when assessing whether an electric supplier can reasonably form an expectation of entitlement to be selected to provide such services.

Sowell's Meats & Services, Inc. v. McSwain, 788 F.2d 226, 228 (4th Cir. 1986) (the majority rule bars "an unsuccessful bidder from bringing an action against public contracting officials"); *Coyne-Delany Co. v. Capital Development Board*, 616 F.2d 341, 342 (7th Cir. 1980) ("The rationale of *Board of Regents v. Roth* [citation omitted] is, in our opinion, inapplicable to the procurement situation . . . ."); *ARA Services, Inc. v. School District*, 590 F. Supp 622 (E.D. Pa. 1984); *City of Atlanta v. Ashland-Warren, Inc.*, No. C81-106A (N.D. Ga. Aug. 20, 1981) (LEXIS, Genfed library, Dist. file); *J.P. Mascaro & Sons, Inc. v. Township of Bristol*, 497 F. Supp. 625 (E.D. Pa. 1980); *Estey Corp. v. Matzke*, 431 F. Supp. 468 (N.D. Ill. 1976) (all doubting the existence of a property interest by a bidder for a government contract or other benefit) *with L & H Sanitation, Inc. v. Lake City Sanitation, Inc.*, 769 F.2d 517 (8th Cir. 1985); *Teleprompter of Erie, Inc. v. City of Erie*, 537 F. Supp. 6 (W.D. Pa. 1981); *Kendrick v. City Council of Augusta*, 516 F. Supp. 1134 (S.D. Ga. 1981); *Three Rivers Cablevision, Inc. v. City of Pittsburgh*, 502 F. Supp. 1118 (W.D. Pa. 1980) (all recognizing the possibility that such a property interest can exist).[5]

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[5] In an analogous context, the Court denied review of a Ninth Circuit decision finding that applicants for welfare benefits, as opposed to those already receiving such benefits, could claim a protected property interest. *See Peer v. Griffeth*, 603 F.2d 118 (3th Cir. 1979), *cert. denied*, 445 U.S. 970 (1980). In his dissent to the denial of certiorari, Chief Justice Rehnquist, although acknowledging that "this Court cannot parse every state-law provision to determine whether it creates a protected 'property interest'," noted the significant distinction between loss or termination of already acquired benefits and benefits sought to be acquired. 445 U.S. at 970. As observed by Chief Justice Rehnquist, the Court had not in 1980 (and still has not in 1992) directly addressed the issue of whether

The Eleventh Circuit's decision in the case below is a significant intrusion by the federal judiciary into state and local government procurement. Countless political subdivisions in this country are subject to lowest responsible bidder procurement requirements. Under the Eleventh Circuit's decision, unsuccessful bidders who allege that governmental officials were arbitrary and capricious in denying them contracts can obtain substantive judicial review of the procurement decision. This unwarranted intrusion into state affairs by the federal courts exceeds the bounds of 42 U.S.C. § 1983.

I.

A GOVERNMENT CONTRACT BIDDER'S INTEREST IN THE AWARD OF A CONTRACT IS INHERENTLY INCHOATE.

In order for a *Roth* entitlement to arise, a person must have "already acquired" "specific benefits." *Roth*, 408 U.S. at 576. *See, e.g., Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978) (termination of utility service); *Arnett v. Kennedy*, 416 U.S. 134 (1974) (termination of employment); *Morrissey*, 408 U.S. 471 (change in status of parolee); *Bell*, 402 U.S. 535 (termination of driver's license); *Goldberg*, 397 U.S. 254 (already acquired welfare benefit had been terminated). In the present case, however, there has been no extension of a government benefit to either Respondent.

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applicants for government benefits have a protected property interest. *Id.*

A. Respondents Have Not "Already Acquired" Government Benefits Because The Contracts Were Never Awarded To Them.

The status of Respondents can be characterized, at best, as applicants for government benefits. The distinction between applicants for benefits, as opposed to those who have already acquired benefits, is a critical one, as recognized by Chief Justice Rehnquist in his dissent to denial of certiorari in *Peer v. Griffeth,* 445 U.S. 970 (1980). (See footnote 5 *supra* at page 10). *See also Lyng v. Payne,* 476 U.S. 926, 942 (1986).[6] Illustrative is *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex,* 442 U.S. 1 (1979), in which the Court distinguished between the situation where a person had been granted parole and that benefit had been revoked and the situation, as was before the Court in that case, where the person was attempting to obtain parole. At the stage of attempting to obtain parole, no benefit had yet been conferred upon the person. *Greenholtz,* 442 U.S. at 10-11. The Court found that while the state statute in question created the possibility of obtaining parole based on certain factors, a mere possibility of obtaining a government benefit could not rise to the level of an entitlement. *Id.* at 11.

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[6] This same distinction was recognized by the Supreme Court of Georgia in *City of Atlanta v. J.A. Jones Construction Co.,* 260 Ga. 658, 398 S.E.2d 369 (1990). There, the Georgia Supreme Court recognized that frustrated bidders do not have a reliance interest in contracts they desire and, accordingly, bidders can recoup only bid preparation costs, but not lost profits or lost economic value of the contract. 260 Ga. at 659, 398 S.E.2d at 371. In so holding, the court stated: "To permit the recovery of lost profits would unduly punish the tax paying public while compensating the plaintiffs for effort they did not make and risks they did not take." *Id.*

In the case at bar, Respondents were not awarded or promised the contracts for which they submitted proposals. As such, they did not acquire a property interest of which they could be deprived within the meaning of the Fourteenth Amendment.

B. The Nature Of The Bidding Process Belies Respondents' Contentions That They Have Property Interests In The Contracts Awarded To Petitioner Georgia Power.

In actuality, the status of each Respondent does not even rise to the level of an applicant for a government benefit. The nature of the competitive process employed by the D.O.C refutes Respondents' contentions that they have protected property interests in the D.O.C.'s choice of electric suppliers. Respondents were not just applying for a government benefit; they were competing against others for that benefit. At the bidding stage, there is no guarantee that one entity will get the contract. Perhaps another entity will be the low bidder; perhaps another entity will offer a more reasonable bid; or, perhaps the state determines not to award the contract at all. These factors are "unknowns," and given this uncertainty, a bidder cannot be assured that it will be awarded a contract. Accordingly, even if a state official's discretion is limited, as found by the court below, *Pataula,* 951 F.2d at 1243 [App. at 9a], no entitlement can arise in the competitive process until the contract is awarded. In *Pataula* the Eleventh Circuit did not address this competitive nature of the bidding process. Rather, it focused only upon whether the D.O.C.'s discretion was sufficiently limited.

Even if this case was to turn on the discretion afforded the D.O.C. officials, however, this Court has determined that the presence of criteria which are in-

tended to guide state officials' decisions do not presumptively create an entitlement. Thus, in *Hewitt v. Helms,* 459 U.S. 460, 471 (1983), the Court cautioned against lightly finding that procedural guidelines give rise to entitlements, stating that "[i]t would be ironic to hold that when a State embarks on such desirable experimentation, it thereby opens the door to scrutiny by the federal courts, while States that choose not to adopt such procedural provisions entirely avoid the strictures of the Due Process Clause." *See Greenholtz,* 441 U.S. at 10 (The decision to grant parole involved "subtle" factors and "an amalgam of elements, some of which are factual but many of which are purely subjective appraisals."). *See also O'Bannon v. Town Court Nursing Center,* 447 U.S. 773, 795 (1980) (Blackmun, J., concurring) ("This Court has never held that *any* substantive restriction upon removal of *any* governmental benefit gives rise to a generalized property interest in its continued enjoyment.") (emphasis in original). Despite this precedent, the Eleventh Circuit, without any analysis of the competitive process, found that the presence of criteria to guide State officials was sufficient to give rise to an entitlement. *See Pataula,* 951 F.2d at 1242-43 [App. at 9a].

In the case at bar, the "lowest responsible bidder" statute which Respondents assert provides a property interest, O.C.G.A. § 50-5-67(b) (Michie 1990 & 1991 Supp.) [App. at 71a], like the statute in *Greenholtz,* involves criteria that require significant subjective appraisals. The Georgia Attorney General recognized this when interpreting this statute's nearly identical predecessor:

> This section clearly vests considerable discretion in the department to consider factors other than price, and, in fact, *directs* it to con-

> sider these factors. The Supreme Court of this state has held that the courts should not interfere in the exercise of such discretionary power unless it is manifestly abused. *J.C. Lewis Motor Co., Inc. v. Mayor & Council of Savannah,* 210 Ga. 591 (1984).

74 Op. Ga. Att'y Gen. 16(1974), at 29 (emphasis in original) [App. at 132a]. How can the few words the Georgia legislators penned meaningfully constrain State officials who purchase a vast array of products and services (from pencils to machines, to buildings, to parcels of land, to electric services), such that any one supplier should expect to be awarded a particular contract? The fact is that while Georgia obviously wants to prevent the State from making purchases from insiders or friends of State officials, it has not mandated other certain purchasers. State officials must procure products in the best interests of the State, and in so doing, they must exercise considerable discretion, especially when seeking to fulfill a vital State need such as utility service to a State prison. The government necessarily must rely to a considerable extent on the judgment of its officials in the procurement of goods and services.

Further, the subjective analysis and evaluation in the selection of a utility to provide electric services is magnified because the Territorial Act provides that selection can be made only one time for the life of the premises. *See* O.C.G.A. § 46-3-8(b) (Michie 1982 & Supp. 1991) [App. at 48a]. As such, when selecting electric suppliers, officials of Georgia must look into the future and make their best guess as to whether the selection made today will be in the best interests of the State tomorrow. This necessarily involves an analysis of "subtle" factors and "an amalgam of elements, some of which are factual but many

of which are purely subjective appraisals." *Greenholtz,* 441 U.S. at 10.[7] By affording Respondents a Section 1983 remedy, a reviewing court improperly substitutes its judgment for the judgment of the state procurement officials.

The Court has been extremely reluctant to allow such substituted judgment. For instance, in *Regents of the University of Michigan v. Ewing,* 474 U.S. 214 (1985), Ewing alleged that he had a property interest in continued enrollment in a University program, and that his dismissal from school was arbitrary and capricious. Ewing further alleged that the dismissal violated his substantive due process rights guaranteed by the Fourteenth Amendment, providing the basis for his claim under 42 U.S.C. § 1983. The Court noted that since Ewing received sufficient process, his claim was that the University misjudged his fitness to remain a student. *Ewing,* 474 U.S. at 225. The Court, however, declined to evaluate the actions of the University, finding that the judiciary was not "suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions — decisions that require 'an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.' " *Ewing,* 474 U.S. at 226 (quoting *Board of Curators, University of Missouri v. Horowitz,* 435 U.S. 78, 89-90 (1978)). *See also Bishop v. Wood,* 426 U.S. 341, 350 (1976) ("The federal court is not the appropriate forum in which to review the

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[7] For example, in the case at bar, the considerations of the D.O.C. went far beyond the current "cost per kilowatt." The D.O.C. necessarily focused upon the method of service, outage history and maintenance capabilities of the suppliers. [Exhibit A to Amended Complaint of Flint EMC (App. at 147a); Exhibit A to Amended Complaint of Pataula EMC (App. at 174a)].

multitude of personnel decisions that are made daily by public agencies.").

In summary, not only did Respondents never acquire property which they claim was taken away arbitrarily, but their unreasonable unilateral expectation is not sufficient to give rise to an entitlement in the context of a competitive selection process. Respondents focus on the existence of a Georgia statute and regulations that require in many cases that state purchases be awarded to the lowest responsible bidder, but they divorce this statute from the competitive process such a procurement scheme puts in place.[8] If an evaluation of the Georgia procurement scheme is necessary, then the provisions of the statute must be analyzed to determine the actual effect on the decisionmaking of Georgia officials. It is one thing for the State to prevent purchases from insiders; but that is a far cry from mandating certain purchases. The latter is, however, what Respondents argue in this case by maintaining that they are entitled to State contracts.

II.

THE DOCTRINE OF SUBSTANTIVE DUE PROCESS DOES NOT PROTECT PERSONS FROM ALL ARBITRARY STATE ACTION.

In response to Petitioners' assertion that D.O.C. officials had the discretion to reject any and all bids, the Eleventh Circuit stated that "the power to reject 'any and all bids' [pursuant to O.C.G.A. § 50-5-67(b)] did not

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[8] This "lowest responsible bidder" system of procurement is typical of state and local government procurement procedures throughout the nation, as is illustrated by the growing legion of federal cases seeking to sort out when a property interest is created. (See, *e.g.*, cases cited at pages 9-10 *supra.)*

empower the defendants to act in an arbitrary manner." *Pataula*, 951 F.2d at 1243 (citing *Konigsberg v. State Bar*, 358 U.S. 252, 273 (1957)) [App. at 11a]. In so ruling, the Eleventh Circuit afforded substantive due process rights to losing bidders, specifically stating that:

> At a minimum, then, plaintiffs state a cognizable claim by alleging that defendants abused their discretion by arbitrarily ignoring competitive bidding requirements. *See Metric Constructors, Inc.*, 729 F.Supp. at 102. The DOC defendants' discretion to choose the lowest responsible bidder thus does not preclude plaintiffs' claim to a constitutionally protected property interest in the award of utility contracts.

Pataula, 951 F.2d at 1243 [App. at 11a].

The Eleventh Circuit's *Pataula* decision is without support in this Court's previous decisions, and conflicts with a First Circuit decision that this Court recently let stand on appeal by denying review. *See PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir. 1991), *cert. dismissed as improvidently granted*, ____ U.S. ____, 112 S. Ct. 1151 (1992). Like the present case, *PFZ Properties* involved the alleged arbitrary denial of a government benefit to an "applicant." In *PFZ Properties*, a real estate developer alleged a Section 1983 cause of action on the basis that a state agency had arbitrarily denied it a construction permit. The First Circuit's discussion of the substantive due process claims in the case merits statement in full:

> In addition to its procedural due process claim, PFZ alleges that ARPE violated its rights to substantive due process when ARPE arbitrarily or capriciously refused to process its approved

construction drawings. This Court has repeatedly held, however, that rejections of development projects and refusals to issue building permits do not ordinarily implicate substantive due process. *See, e.g., Chongris v. Board of Appeals of Town of Andover*, 811 F.2d 36, 42-43 (1st Cir.), *cert. denied*, 483 U.S. 1021, 107 S.Ct. 3266, 97 L.Ed.2d 765 (1987); *Chiplin Enterprises v. City of Lebanon*, 712 F.2d 1524, 1528 (1st Cir. 1983); *Creative Environments*, 680 F.2d at 829-30. Even where state officials have allegedly violated state law or administrative procedures, such violations do not ordinarily rise to the level of a constitutional deprivation. *See Chiplin Enterprises*, 712 F.2d at 1528. The doctrine of substantive due process "does not protect individuals from all [governmental] actions that infringe liberty or injure property in violation of some law. Rather, substantive due process prevents 'government power from being used for purposes of oppression,' or 'abuse of government power that shocks the conscience,' or 'action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests.' " *Committee of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929, 943 (D.C. Cir. 1988) (citations omitted). *See Pittsley v. Warish*, 927 F.2d 3 (1st Cir. 1991); *see also Hoffman v. City of Warwick*, 909 F.2d 608, 618 (1st Cir. 1990) (applying a "rational basis" test to government action challenged under a substantive due process theory). PFZ's allegations concerning ARPE's treatment of its proposal simply do not make out a

> substantive due process violation under this standard.

PFZ Properties, 928 F.2d at 31-32.

This Court has established that the first inquiry in any Section 1983 suit must be whether the plaintiff was deprived of a right secured by the Constitution and laws, an inquiry that was made by the First Circuit in *PFZ Properties*. In *Baker v. McCollan*, 443 U.S. 138, 140 (1979) the Court acknowledged that the respondent, McCollan, had been deprived of his liberty, but the issue in substantive due process analysis is whether the deprivation rises to a constitutional violation. The Court found that a false imprisonment of three days does not and could not amount to such a violation. *Baker*, 443 U.S. at 145. In the case *sub judice*, the Eleventh Circuit made no evaluation as to whether the alleged deprivation of property amounted to a constitutional violation. In ruling that Respondents made out a substantive due process claim by alleging that state officials did not follow state law, the Eleventh Circuit exceeded the parameters of constitutional doctrine established by this Court.

CONCLUSION

The actions of state and local governments affect citizens in many ways, but every interest or relationship a person has with such governments is not subject to scrutiny in the federal courts and is not subject to the strictures of the Due Process Clause. For Section 1983 to be used as a vehicle for invoking the Due Process Clause, a person must possess, that is, have "already acquired" property that was deprived without adequate process. *See Roth*, 408 U.S. at 576. The Court in the early 1970's extended the protection of property afforded under the

Constitution to government benefits already possessed by persons, such as driver licenses or welfare benefits, because the benefits took on traditional attributes of property, such as possession. In this case, however, Respondents never came to possess or acquire the government benefit they desired, *i.e.,* to be selected as exclusive life-of-the-premises electric suppliers for State facilities. Therefore they have no property interest in these contracts.

The competitive selection process involved in this case also belies Respondents' contentions that they possess an entitlement to be the State of Georgia's suppliers of electricity to the facilities in question. Moreover, while Georgia officials must award certain contracts to the lowest responsible bidder, this requirement inherently provides a great deal of discretion in order to determine responsiveness to the State's needs.

The Court's precedents, such as *Roth,* should not be extended so that a class of plaintiffs such as Respondents can use 42 U.S.C. § 1983 as a vehicle to seek substantive federal judicial review of state government procurement decisions. The dispute these Georgia utilities have with the State of Georgia does not implicate nor necessitate the supervision of the federal courts or the protection of the Due Process Clause of the United States Constitution, particularly since Respondents are not discrete and insular minorities but are private commercial entities. *See O'Bannon,* 447 U.S. at 800 n.8. (Blackmun, J., concurring).

If the Eleventh Circuit opinion below is left to stand, federal court involvement in the affairs of state government will increase dramatically, at a time when the lower federal courts generally are looking to this Court to limit

federal court involvement in state contracting. *See, e.g., Patterson v. Portch,* 853 F.2d 1399, 1405 (7th Cir. 1988) (Posner, J.) ("The continued appropriateness of using federal courts to resolve run-of-the mine contract disputes between public employees and their employers may deserve fresh consideration by the Supreme Court, but at our level the issue is foreclosed."). Because countless political subdivisions are subject to "lowest responsible bidder" statutes, the federal courts, at least in the Eleventh Circuit, will now be in the business of reviewing the purchasing decisions of the state and municipal governments.

For these reasons, Petitioner Georgia Power Company respectfully requests that the Supreme Court accept certiorari in this case.

Respectfully submitted,

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Dated: June 26, 1992

No. 92-

IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

October Term, 1992

BOBBY WHITWORTH, Individually and in his official capacity as Commissioner of the Department of Corrections of the State of Georgia, CLYDE STOVALL, Individually and in his official capacity as Assistant Commissioner of the Department of Corrections of the State of Georgia, DAVID C. EVANS, Individually, and GEORGIA POWER COMPANY,

Petitioners,

v.

PATAULA ELECTRIC MEMBERSHIP CORPORATION and FLINT ELECTRIC MEMBERSHIP CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

CERTIFICATE OF SERVICE

I, Ralph H. Greil, a member of the Bar of this Court, hereby certify that on this 26th day of June, 1992, three copies of the Petition of Georgia Power Company for Writ of Certiorari and Appendix thereto in the above-entitled case were served upon counsel of record by depositing same in the United States Mail, properly addressed and with adequate postage thereon to:

James A. Orr, Esquire, Paul, Hastings, Janofsky & Walker, 42nd Floor — Georgia Pacific Center, 133 Peachtree Street, N.E., Atlanta, Georgia 30303, (404) 588-9900, counsel for Respondents Pataula EMC and Flint EMC, and to William F. Amideo, Esquire, The Department of Law, State of Georgia, 132 State Judicial Building, Atlanta, Georgia 30334, (404) 656-3355, counsel of record for Petitioners Whitworth, Stovall, and Evans. I further certify that all parties required to be served have been served.

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